failure to appear by a defendant, thereby allowing trial courts and prosecutors to randomly alter or make a new bail bond without notice to defendants or defendants' sureties.

"'It is not the province of the court to alter a contract by construction or to make a new contract for the parties; its duty is confined to the interpretation of the one which they have made for themselves, without regard to its wisdom or folly.' [Citation]." *Seven Springs Farm, Inc. v. Croker*, 748 A.2d 740, 744 (Pa.Super.2000).

b.

"The basic purpose of notice of modifications in the bond is to afford the surety an opportunity to withdraw as surety where the modifications materially increases the risk of flight." *U.S. v. Gambino*, 809 F.Supp. 1048, 1055 (S.D.N.Y. 1992).

The Iowa court of appeals claims "'[t]he State's duty to provide a defendant a speedy trial does not require that it play a game of hide-and-go-seek with him.' *Lyles*, 225 N.W.2d at 126." (court of appeals opinion, appendix A8-9).

The only game of 'hide-and-go-seek' in this matter occurred because petitioner and petitioner's surety were not sent

statutory ten days' written notice after entry of failure to appear, and the prosecution consented to the illegal entry of failure to appear. The trial court and the prosecution aided-and-abetted petitioner into achieving fugitive status. Petitioner's surety (1) should have been notified of petitioner's failure to appear, and (2) should have been notified the trial court modified petitioner's bond in a manner that significantly increases the risk of flight. By not sending statutory ten days' written notice to defendants and their sureties after failure to appear, Iowa courts and prosecuting attorneys are significantly increasing the risk of flight and are aiding-and-abetting fugitives.

III.

The failure of the trial court in this matter to instruct the clerk to send written ten days' notice to petitioner and petitioner's surety is an act in excess of the court's jurisdiction. The Iowa court of appeals erred.

"[W]here a statute requires a court to exercise its jurisdiction in a particular manner, follow a particular procedure, or subject to certain limitations, an act beyond those limits is in excess of its jurisdiction." *People v. Ranger Ins. Co.*, 9 Cal.App.

4th 1302, 1306-07, 12 Cal.Rptr.2d 343, 346 (Cal.App. 1 Dist. 1992) (internal quotation marks and citations omitted)..

"Due to the trial court's failure to follow statutory notice requirements, it lacked jurisdiction to forfeit the bail or enter summary judgment against [petitioner's] surety." *Id.*, 9 Cal.App. 4th at 1306, 12 Cal.Rptr.2d at 346. Likewise, the trial court lacked jurisdiction to *forfeit* petitioner's right to a speedy trial within 90-days of indictment.

Iowa courts "do not adhere to the four-factor *Barker v. Wingo* test because '[i]f the reason for the delay is sufficient the other factors are not needed. If the reason for the delay is insufficient *the other factors will not avail to avoid dismissal.*' [Citation]." *State v. Miller*, 637 N.W.2d 201, 205 (Iowa 2001).

> The fault for and cause of the delay, therefore, falls squarely upon the court's invalid [entry of failure to appear] and not upon the petitioner. This is not only a lack of a showing of good cause for the delay by the prosecution as is required by [Iowa Rule of Criminal Procedure 2.33(2)(b)], but on the contrary, affirmatively establishes that there was not good cause

for the delay. *Beasley v. Municipal Court*, 32 Cal.App.3d 1020, 1028, 108 Cal.Rptr. 637, 642 (App., 1973).

IV.

The State of Iowa is estopped from attributing the delay to petitioner because the prosecution consented to an illegal entry of failure to appear.

> "When as here, the court has jurisdiction of the subject, a party who seeks or consents to action beyond the court's power as defined by statute or decisional rule may be estopped to complaining of the ensuing action in excess of jurisdiction. [Citations]. Whether he shall be estopped depends on the importance of the irregularity not only to the parties but to the function of the courts and in some instances on other considerations of public policy. A litigant who has stipulated to a procedure in excess of jurisdiction may be estopped to question it when '"[t]o hold otherwise would permit the parties to trifle with the courts."' [Citations]. *Law Offices of Stanley J.*

Bell v. Shine, Browne, & Diamond, 36 Cal.App.4th 1011, 1023, 43 Cal.Rptr.2d 717, 723 (Cal.App. 1 Dist. 1995).

Consent by the State of Iowa's attorney(s) to withholding statutory ten days' written notice after failure to appear resulted in what can only be classified as an unnecessary governmental delay in the proceedings. "'[T]he essential ingredient [of a speedy trial] is orderly expedition and not mere speed.' [Citation]." *United States v. Marion*, 404 U.S. 307, 313, 92 S.Ct. 455, 459, 30 L.Ed.2d 468, 474 (1971).

> "* * * [G]overnmental delay that is 'purposeful or oppressive' is unjustifiable. . . . The same may be true of any governmental delay that is unnecessary, whether intentional or negligent in origin. A negligent failure by the government to ensure speedy trial is virtually as damaging to the interests protected by the right as an intentional failure; when negligence is the cause, the only interest necessarily unaffected is our common concern to prevent deliberate misuse of the criminal process by public officials. Thus the crucial

question in determining the legitimacy of governmental delay may be whether it might have been avoided - whether it was unnecessary." *United States v. Marion*, 404 U.S. 307, 334, 92 S.Ct. 455, 470, 30 L.Ed.2d 468, 486 (1971) (Mr. Justice Douglas, concurring (quoting from *Dickey v. Florida*, 398 U.S., at 51-52, 26 L.Ed.2d at 40 (Brennan, J., concurring)).

WHEREFORE, petitioner prays that a writ of certiorari issue herein and that on hearing thereof the trial court's act of failing to adhere to Iowa Code § 811.6 (1) when making entry of failure to appear in this matter be annulled and be decreed an act in excess of the trial court's jurisdiction; and that on hearing thereof petitioner's right to due process of law and right to a speedy trial be decreed to have been violated; and that petitioner have judgment for costs.

DATED this 28th day of April, 2006.

Respectfully submitted,

Michael W. Young

APPENDIX A

IN THE COURT OF APPEALS OF IOWA

No. 5-752 / 04-1996

Filed December 7, 2005

STATE OF IOWA,

Plaintiff-Appellee,

vs.

MICHAEL WAYNE YOUNG,

Defendant-Appellant.

Appeal from the Iowa District Court for Tama County, Stephen C. Gerard II, District Associate Judge (motion) and Douglas C. Russell, Judge (trial and sentencing).

Michael Wayne Young appeals the district court's judgment denying his motion for a new trial. **AFFIRMED.**

Michael Young, Tama, pro se, for appellant.

Thomas J. Miller, Attorney General, Robert P. Ewald, Assistant Attorney General, and Brent D. Heeren, County Attorney, for appellee.

Considered by Huitink, P.J., and Mahan and Hecht, JJ.

MAHAN, J.

Michael Wayne Young appeals the district court's judgment denying his motion for a new trial. Specifically, he argues that his trial was in violation of both his statutory and his constitutional speedy trial rights. He claims (1) he was not given notice of his pretrial date, his trial date, or his failure to appear and (2) his bail was not forfeited. We affirm.

I. Background Facts and Proceedings

Young was arrested for assaulting an officer on February 20, 2004. He was released on bail on February 23. The State filed a trial information charging him with serious assault on a peace officer in violation of Iowa Code sections 708.1, 708.3A, and 708.3A(4) (2003) on March 30. Young was arraigned on April 20.[1] Later on April 20, the court filed an arraignment order. The order set Young's pretrial conference for May 4 and his trial for May 17. A notation on the order indicates it was mailed to Young

[1] Notice of this formal arraignment was sent to Young at his home address. He personally appeared at the arraignment.

on April 20. Young filed a discovery request and notice of an affirmative defense on April 28. On May 4, Young failed to appear for his pretrial conference. The court issued an arrest warrant on May 10. Young's ninety-day speedy trial period expired on June 28. On August 2, Young was arrested when he appeared at the courthouse to inquire about his case. He was released on his previous bond. He filed a motion to have the case dismissed due to violation of his speedy trial rights. The district court denied the motion. The supreme court denied his interlocutory appeal. His jury trial began, and he was found guilty, on October 18. Young appeals.

II. Standard of Review

Young alleges violations of both his statutory and constitutional speedy trial rights. We review his statutory claim for corrections of errors at law. *State v. Olson*, 528 N.W.2d 651, 653 (Iowa 1995). It is, however, within the trial court's discretion to refuse to dismiss a case under several exceptions to the speedy trial rule. *Id.* Therefore, our ultimate review of the statutory speedy trial claims is for abuse of discretion. *Id.*

We review Young's constitutional claims de novo. *In re Detention of Hodges*, 689 N.W.2d 467, 470 (Iowa 2004). Young urges us to use a plain error review. Plain error review is used when a court reviews a constitutional claim that has not been preserved. *State v. Johnson*, 272 N.W.2d 480, 484 (Iowa 1978). Iowa does not recognize such a rule. *State v. Escobedo*, 573 N.W.2d 271, 277 (Iowa Ct. App. 1997). It is well-settled in our courts that constitutional claims, like any other claim, must be preserved for appellate review. *State v. Yaw*, 398 N.W.2d 803, 805 (Iowa 1987); *Johnson*, 272 N.W.2d at 484 (Iowa 1978). Because Young's claim has been properly preserved, there is no need to re-address our rule on plain error review.

III. Merits

Young claims his right to a speedy trial was violated because he was not tried until eight months after his arrest. He claims he failed to appear at the originally appointed date because he failed to receive notice of (1) his pretrial and trial dates and (2) his own failure to appear. He also argues that if he failed to appear, the district court was bound to forfeit his bail and send his

surety notice of the forfeiture. We address each of his arguments in turn.

Iowa Rule of Criminal Procedure 2.33, Article I, section 10 of the Iowa Constitution, and the Sixth Amendment to the United States Constitution all guarantee an individual the right to a speedy trial. *Olson*, 528 N.W.2d at 653. We have held that the protections in rule 2.33 are more stringent than those guaranteed by the Constitution. *State v. Nelson*, 600 N.W.2d 598, 600 (Iowa 1999). Rule 2.33(2)(b) states:

> If a defendant indicted for a public offense has not waived the defendant's right to a speedy trial the defendant must be brought to trial within 90 days after indictment is found or the court must order indictment to be dismissed unless good cause to the contrary be shown.

Under the rule, the court must dismiss an indictment unless (1) the defendant waives the right; (2) the delay is attributable to the defendant or (3) there is "good cause" for the delay. *Nelson*, 600 N.W.2d at 600.

In this case, Young failed to appear. Because his reasons for not appearing allege fault with the State, we address them before returning to his speedy trial claim. We must determine whether his failure to appear may constitute good cause for the State's delay in trying him. See *State v. Lyles*, 225 N.W.2d 124, 126 (Iowa 1975) ("[d]elay attributable to the defendant may constitute good cause preventing the State from carrying out its obligation [to provide a speedy trial]").

First, Young claims he never received notice of his pretrial date. A notation in the corner of his arraignment order creates a presumption that the order was mailed to him. See *Liberty Mutual Ins. Co. v. Caterpillar Tractor Co.*, 353 N.W.2d 854, 858 (Iowa 1984) (noting that proof of mailing rests on proof of the practice of mailing in the clerk's office). In order to show he failed to receive notice, Young must rebut the presumption that notice was served when the clerk mailed the order. Young's mere assertion he did not receive notice is not enough to rebut this presumption.

Second, Young argues that he should have been sent notice of his failure to appear. He also argues that his bail should have been forfeited. We suspect Young is pursuing the court's

decision not to forfeit his bail because, if his bail had been forfeited, his surety (his father who lived at the same address) would have received further notice. Both arguments are unpersuasive. Under Iowa Code section 811.6, when a defendant fails to appear, "the court must direct an entry of the failure to be made of record, and the undertaking of the defendant's bail, or the money deposited, is thereupon forfeited." The section goes on to describe the notice that must be given to the defendant's surety before ~~bail is~~ forfeited. Iowa Code § 811.6.

While the language of the statute is mandatory in its terms, the decision to pursue forfeiture of bail is discretionary. We come to this conclusion because (1) forfeiture is a separate action and (2) previous case law indicates forfeiture is within the court's discretion. First, forfeiture is a separate civil action, not a part of the criminal proceeding. Thus, it is within the court's or the prosecution's discretion whether to institute the proceedings. See *State v. Iowa Dist. Court*, 568 N.W.2d 505, 508 (Iowa 1997) ("[t]he decision whether to prosecute, and if so on what charges, is a matter ordinarily within the discretion of the duly elected prosecutor"). Finally, our case law instructs it is within the court's

discretion to enter judgment for the amount of the bail on the forfeiture. *State v. Cain*, 608 N.W.2d 793, 795 (Iowa 2000); *State v. Costello*, 489 N.W.2d 735, 738 (Iowa 1992); *State v. Shell*, 242 Iowa 260, 264, 45 N.W.2d 851, 854 (1951). Further, "[t]he purpose of the criminal law is to secure the punishment of criminals, and not to have the state profit financially by the collection of a judgment on a forfeited bond." *State v. Thomason*, 226 Iowa 1057, 1066, 285 N.W. 636, 640 (1939) (quoting *Bruntlett v. Carroll County*, 193 Iowa 875, 884, 188 N.W. 142, 145 (1921)).

In this case, rather than forfeit Young's bail, the district court entered an order of failure to appear pursuant to section 811.7. Under that section no notice is required. We find no abuse of discretion in the district court's choice. Thus, to answer Young's argument, it is not necessary to either send a failure to appear notice or institute forfeiture proceedings.

We therefore return to Young's speedy trial claim. Because he cannot show any good reason why he failed to appear, we conclude the delay is attributable to him. "The State's duty to provide a defendant a speedy trial does not require that it play a

game of hide-and-go-seek with him." *Lyles*, 225 N.W.2d at 126. Young's failure to appear constitutes good cause for the State's delay in trying him. See *id.*

AFFIRMED.

APPENDIX B

IN THE SUPREME COURT OF IOWA

No. 04-1996

Tama County No. SRCR010126

Filed February 7, 2006

ORDER

STATE OF IOWA,

Plaintiff-Appellee,

vs.

MICHAEL WAYNE YOUNG,

Defendant-Appellant.

After consideration by this court, further review of the above captioned case is denied.

Dated this 7th day of February, 2006.

THE SUPREME COURT OF IOWA

By: Louis A. Lavorato, Chief Justice

Copies to:

Michael Wayne Young

438 Red Earth Dr.

Tama, IA 52339

Attorney General

Attn: Robert P. Ewald

Hoover Bldg.

LOCAL

APPENDIX C

IN THE IOWA DISTRICT COURT

IN AND FOR TAMA COUNTY

No. SRCR010126

Filed September 7, 2004

STATE OF IOWA,

Plaintiff,

vs.

MICHAEL WAYNE YOUNG,

Defendant.

ORDER RE: MOTION TO DISMISS AND PRE-TRIAL CONFERENCE

Hearing on Defendant's Motion to Dismiss came before the Court this date. The Defendant appeared pro se. The State appeared by Tama County Attorney Brent D. Heeren. Having heard the statements and arguments of the parties, the Court now makes the following findings:

1. The Trial Information was filed on March 30, 2004.
2. Pretrial Conference was set for May 4, 2004.
3. Trial was set for May 17, 2004.

4. The Defendant failed to appear at the time set for Pretrial Conference on May 4, 2004, and a warrant was issued for his arrest.
5. The Defendant next appeared on August 2, 2004, and was released on the bond previously posted.
6. By Pretrial Order entered on August 3, 2004, trial was reset for September 20, 2004. The Defendant reasserted his speedy trial demand.

Trial in this case was set within ninety days of the filing of the Trial Information. As a result of the Defendant's failure to appear, trial could not be held as scheduled. The delay from May 4, 2004, to August 2, 2004, should be attributable to the Defendant. Trial is now rescheduled within the time allowed and Defendant's Motion to Dismiss should be and is hereby denied.

The Court advised the Defendant of his right to counsel and of the right to counsel at State expense in the event he was indigent and unable to afford an attorney. The Court advised the Defendant of the desirability of being represented by counsel. The Defendant acknowledged that he understood these rights and the difficulties of proceeding without counsel and indicated to the

Court that he desired to represent himself and waived his right to counsel. The Court finds that the Defendant is making a knowing and voluntary waiver of his right to counsel and will permit the Defendant to proceed, pro se, herein.

The Court proceeded to conduct a Pretrial Conference.

The Clerk to notify.

Dated this 7th day of September, 2004.

Stephen C. Gerard II

District Associate Judge

Date: 9-8-04

Mailed to: Co Atty

Def

DCS

SO

By: CS

Clerk's Office Personnel Responsible

for Mailing Document

APPENDIX D

IN THE IOWA DISTRICT COURT

IN AND FOR TAMA COUNTY

No. SRCR010126

Filed August 23, 2004

STATE OF IOWA,

Plaintiff,

MOTION TO DISMISS

vs.

MICHAEL WAYNE YOUNG,

Defendant.

COMES NOW defendant, Michael Wayne Young, *pro* se, pursuant to Rule 2.33(2) of the Iowa Rules of Criminal Procedure, moves this Court for an order dismissing the trial information of this matter and for grounds shows:

1. defendant did not waive his right to a speedy trial;
2. on February 23, 2004, defendant was released from jail on bail;
3. on March 30, 2004, trial information was filed;

4. on April 20, 2004, an "Arraignment Order" was filed requiring defendant to appear for a pretrial hearing on May 4, 2004;

5. defendant did not receive a copy of the "Arraignment Order" until August 2, 2004; see defendant's "Affidavit" affixed hereto and incorporated herein by this reference;

6. on May 4, 2004, an "Entry of Failure to Appear and Order" was filed;

7. the certificate of service included with the "Entry of Failure to Appear and Order" clearly shows the defendant was not served a copy thereof;

8. the defendant was not served written notice of the "Entry of Failure to Appear and Order";

9. defendant did not receive a copy of the "Entry of Failure to Appear and Order" until August 2, 2004; see defendant's "Affidavit";

10. the "Entry of Failure to Appear and Order" fails to comply with clear and precise language of Iowa Code § 811.6 which requires the court's entry of failure to appear to include directions to the clerk of district court to give

written notice to the defendant and the defendant's sureties to appear before the court;

11. the clerk of district court did not give written notice to defendant and defendant's sureties to appear, and show cause, why a judgment for the amount of defendant's bond;

12. the State has failed to bring defendant to trial within ninety (90) days after filing of trial information.

WHEREFORE, the defendant prays this Court:

1. nullify the "Entry of Failure to Appear and Order";
2. enter an order, as aforesaid, dismissing the trial information in this matter;
3. enter any further order as law and justice may require.

DATED this 23rd day of August, 2004.

Respectfully submitted,

Michael W. Young

PROOF OF SERVICE AND CERTIFICATE OF FILING

I hereby certify that on the 23rd day of August, 2004, I will serve this motion by hand delivering a true copy thereof to the Office of the Tama County Attorney, 100 W. High St., Toledo, IA 52342, and I will file this motion by hand delivering a true copy thereof to the Clerk of the Iowa District Court for Tama County, 100 W. High St., Toledo, IA 52342.

Signed,

Michael W. Young

AFFIDAVIT

Filed August 23, 2004

State of Iowa)
) ss.
County of Tama)

In the criminal case *State of Iowa v. Michael Wayne Young*, Iowa District Court for Tama County Case No. SRCR10126, I, Michael Wayne Young, did not receive a copy of the "Arraignment Order", filed April 20, 2004, until August 2, 2004; nor did I receive a copy of the "Entry of Failure to Appear and Order", filed May 4, 2004, until August 2, 2004; nor did I receive any notice of entry of the aforementioned documents; nor was I aware of the aforementioned documents until August 2, 2004.

On August 2, 2004, I was at the Tama County Courthouse in Toledo, Iowa, doing research in the law library. While at the courthouse, I stopped by the Office of the Tama County Attorney to request a copy of my criminal record. At which time, I also inquired about any court orders that may have been filed since my arraignment hearing on April 20, 2004.

Subsequently, I was informed there was a warrant for my arrest for failure to appear. The Office of the Tama County Attorney then provided me with my first copy of the "Arraignment Order", filed April 20, 2004, and my first copy of the "Entry of Failure to Appear and Order", filed May 4, 2004.

Immediately thereafter, I went to the Office of the Clerk of Iowa District Court for Tama County and began inquiring about being added to the court's docket for August 3, 2004.

DATED: This 23rd day of August, 2004.

Signed,

Michael W. Young

438 Red Earth Drive

Tama, Iowa 52339

Subscribed, sworn to, and acknowledged before me by Michael W. Young this 23rd day of August, 2004.

Ronda Lea Burnes

Notary Public or other Officer

authorized to take and certify

acknowledgments and administer oaths

PROOF OF SERVICE AND CERTIFICATE OF FILING

I hereby certify that on the 23rd day of August, 2004, I will serve this affidavit by hand delivering a true copy thereof to the Office of the Tama County Attorney, 100 W. High St., Toledo, IA 52342, and I will file this affidavit by hand delivering a true copy thereof to the Clerk of the Iowa District Court for Tama County, 100 W. High St., Toledo, IA 52342.

Signed,

Michael W. Young

IN THE IOWA DISTRICT COURT

IN AND FOR TAMA COUNTY

No. SRCR010126

Filed August 23, 2004

STATE OF IOWA,

Plaintiff,

vs.

MICHAEL WAYNE YOUNG,

Defendant.

MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS

"If an individual is threatened with State action which will deprive him of life, liberty or property, he is entitled to due process. What process is due depends upon the nature of the government function and individual interest involved." *State v. Grimme*, 274 N.W.2d 331, 336 (Iowa 1979).

In this case, defendant obtained pretrial release from jail on bail; therefore, the defendant has a liberty interest to be free from physical restraint and to avoid incarceration; defendant's surety has a property interest. Defendant and defendant's surety are entitled to due process protection if state action threatens

deprivation of their respective interests. What process is due for defendant's alleged failure to appear to prevent an erroneous deprivation of the aforementioned interests?

Usually, due process requires "some kind of notice and ... some kind of hearing. "Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified."" *Goss v. Lopez*, 419 U.S. 565, 579, 42 L.Ed.2d 725, 737, 95 S.Ct. 729 (1975) (citation omitted). See also *Bartsch v. Bartsch*, 636 N.W.2d 3, 9 (Iowa 2001) (due process requires, in status determinations as well as others, reasonable attempts to notify the defendant and a reasonable opportunity to defend).

Iowa Code § 811.6 provides procedural due process protection to ALL defendants released on bail who allegedly fail to appear to prevent an erroneous deprivation of a defendant's liberty and to prevent an erroneous deprivation of property from a defendant's surety; "the court must direct an entry of the failure to be made of record, and the undertaking of the defendant's bail, or the money deposited, thereupon forfeited. **As part of the entry...the court shall direct the clerk of the district court of**

the county to give ten days' notice in writing to the defendant and the defendant's sureties to appear and show cause, if any, why judgment should not be entered for the amount of the bail." Iowa Code § 811.6 (boldness added).

When the court made entry of defendant's alleged failure to appear in this case, the court failed to include in the "Entry of Failure to Appear and Order" directions to the clerk to give written notice to the defendant and the defendant's surety to appear before the court; in other words, the state failed to comply with precise and clearly stated requirements of Iowa Code § 811.6 resulting in neither defendant nor defendant's surety being notified of defendant's alleged failure to appear; thereby, defendant has been denied his right to equal protection of the law; therefore, the "Entry of Failure to Appear and Order" is voidable.

The "defendant has no duty to bring himself to trial; the State has that duty as well as the duty of insuring that the trial is consistent with due process." *Barker v. Wingo*, 407 U.S. 514, 527, 33 L.Ed.2d 101, 115, 92 S.Ct. 2182 (1972) (footnotes omitted). See also *State v. Miller*, 637 N.W.2d 201, 204 (Iowa 2001) (State 90-day speedy trial rule is more stringent than its federal

constitutional counterpart, and so state court does not apply *Barker's* four factor balancing test, but must dismiss for failure to comply with the rule's 90-day deadline unless the defendant has waived speedy trial, the delay is attributable to the defendant, or other "good cause" exists for the delay); *State v. Olson*, 528 N.W.2d 651, 654 (Iowa App. 1995) (Prejudice which results from impaired defense is most difficult type of speedy trial prejudice to prove because harm associated with passage of time can scarcely be shown; for that reason, it is recognized that extensive delay presumptively compromises reliability of trial in ways that neither party can prove nor, for that matter, identify).

In this case, the defendant did not waive his right to a speedy trial, the defendant has not been brought to trial within 90 days of filing trial information, and the delay is attributable to the state for failing to comply with Iowa Code § 811.6; therefore, the trial information must be dismissed.

DATED this 23rd day of August, 2004.

Respectfully submitted,

Michael W. Young

PROOF OF SERVICE AND CERTIFICATE OF FILING

I hereby certify that on the 23rd day of August, 2004, I will serve this memorandum by hand delivering a true copy thereof to the Office of the Tama County Attorney, 100 W. High St., Toledo, IA 52342, and I will file this memorandum by hand delivering a true copy thereof to the Clerk of the Iowa District Court for Tama County, 100 W. High St., Toledo, IA 52342.

Signed,

Michael W. Young

APPENDIX F

IN THE IOWA DISTRICT COURT

IN AND FOR TAMA COUNTY

No. SRCR010126

Filed May 4, 2004

STATE OF IOWA,

Plaintiff,

vs.

MICHAEL WAYNE YOUNG,

Defendant.

ENTRY OF FAILURE TO APPEAR AND ORDER

The above Defendant was required to appear for pretrial conference at 1 o'clock p.m. on the 4 day of May, 2004, and the Defendant failed to appear as required.

IT IS THEREFORE ORDERED that a warrant be issued for the arrest of the Defendant and, pursuant to Iowa Code Section 811.7, Defendant shall

[X] be admitted to bail in the sum of $5000.00 cash only.

[ ] not be admitted to bail.

Ordered this 4 day of May, 2004.

Thomas R. Hronek

Judge, Sixth Judicial District

Dates: 5-10-2004

Mailed to: Co Atty

DCS

SO

By: AH

Clerk's Office Personnel Responsible

for Making Document

APPENDIX G

IN THE SUPREME COURT OF IOWA

No. 04-1996

STATE OF IOWA,

Plaintiff-Appellee,

vs.

MICHAEL YOUNG,

Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT

OF TAMA COUNTY

THE HONORABLE DOUGLAS S. RUSSELL, JUDGE

FINAL REPLY BRIEF OF APPELLANT

MICHAEL YOUNG

Pro Se

438 Red Earth Dr.

Tama, Iowa 52339

CERTIFICATE OF FILING AND PROOF OF SERVICE

I hereby certify that on the 27th day of June, 2005, I will serve this final reply brief by mailing two (2) copies thereof to the Office of the Tama County Attorney, 100 W. High St., Toledo, Iowa 52342, and by mailing two (2) copies thereof to the Office of the Iowa Attorney-General, Hoover State Office Building, Des Moines, Iowa 50319.

I further certify that on the 27th day of June, 2005, I will file this final reply brief by mailing eighteen (18) copies thereof to the Clerk of the Iowa Supreme Court, Iowa Judicial Building, 1111 East Court Avenue, Des Moines, Iowa 50319.

Michael Young

438 Red Earth Dr.

Tama, Iowa 52339

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REPLY

The State argues for a "bright line" rule that Appellant, by not appearing for pretrial conference on May 4, 2004, waived his right to a trial within 90-days after filing of trial information and that the 90-day period "started anew" on August 2, 2004. *Appellee's Brief*, at 12-14.

Before adopting such a "bright line" rule, the appellate court should analyze the State's argument in constitutional terms.

The Iowa legislature granted criminal defendants a constitutionally protected "liberty" interest when it required that defendants be brought to trial within 90-days after filing of trial information; Iowa R. Crim. P. 2.33 (2); therefore, a defendant's speedy trial rule "liberty" interest cannot be denied without due process of law. See *Johnson v. Overberg*, 639 F.2d 326 (6th Cir) (1981) (Ohio legislature granted petitioner liberty interest when it required that he be tried within 90 days of his arrest and this

liberty interest could not be denied without due process of law). "Once a State has granted . . . a liberty interest . . . due process protections are necessary to insure that the state-created right is not arbitrarily abrogated." *Vitek v. Jones*, 445 U.S. 480, 488-89, 63 L.Ed.2d 552, 562, 100 S.Ct. 1254 (1980) (internal quotation marks and citation omitted).

"The [Fourteenth Amendment] Due Process Clause also forbids arbitrary deprivations of liberty. Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, the minimal requirements of the Clause must be satisfied." *Goss v. Lopez*, 419 U.S. 565, 574, 42 L.Ed.2d 725, 735, 95 S.Ct. 729 (1975) (internal quotations and citations omitted). "Procedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment." *Mathews v. Eldridge*, 424 U.S. 319, 332, 47 L.Ed.2d 18, 31, 96 S.Ct. 893 (1976). "The right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic

to our society. The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." *Mathews v. Eldridge*, 424 U.S. at 333, 47 L.Ed.2d at 32 (1976).

"While the legislature may elect not to confer a [liberty] interest . . . it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards. . . . [T]he adequacy of statutory procedures for deprivation of a statutorily created [liberty] interest must be analyzed in constitutional terms." *Vitek v. Jones*, 445 U.S. 480, 490-91, 63 L.Ed.2d 552, 563, 100 S.Ct. 1254 (1980) (n. 6, quoting *Arnett v. Kennedy*, 416 U.S. 134, 167, 40 L.Ed.2d 15, 40-41, 94 S.Ct. 1633 (1974) (opinion concurring in part)).

The question that needs to be answered is what process are defendants due under the United States Constitution after non-appearance to protect their speedy trial rule "liberty" interest. The term 'failure to appear' precludes a pre-deprivation hearing; therefore, due process guarantees defendants a post-deprivation hearing at a meaningful time and in a meaningful manner to

protect their speedy trial rule "liberty" interest from arbitrary or erroneous abrogation.

Does a surety immediately suffer permanent "grievous loss" of "property" based solely upon their principal's non-appearance? No, because Iowa Code § 811.6 (1) provides procedural due process protections which are consistent with federal law to ensure that sureties are not arbitrarily or erroneously deprived of their "property." Likewise, defendants cannot be condemned to suffer permanent "grievous loss" of their speedy trial rule "liberty" interest based solely upon non-appearance without a hearing at a meaningful time and in a meaningful manner.

Defendants have a reasonable expectation that the State of Iowa will abide by the express statutory bail bond contract terms of Iowa Code § 811.6 (1) and reasonable expectation that their speedy trial rule "liberty" interest cannot and will not be undermined by the State of Iowa breaching the contract by failing to provide the required written ten-days' notice following non-appearance. See *Kentucky Dept. of Corrections v. Thompson*, 490 U.S. 454, 462-63, 104 L.Ed.2d 506, 516-17, 109 S.Ct. 1904 (1989)

(discussing liberty interests and mandatory language ('shall') in state statutes).

Courts have no discretionary or inherent powers to circumvent or to disregard constitutional or statutory provisions. *Carlisle v. United States*, 517 U.S. 416, 426, 134 L.Ed.2d 613, 624, 116 S.Ct. 1460 (1996). Following a defendant's non-appearance, the speedy trial rule 90-day time period cannot be "tolled" or "start anew" until an entry of failure to appear that fully complies with Iowa Code § 811.6 (1) is made of record and the required ten-days' notice is sent to a defendant and defendant's surety.

After a lawful entry of failure to appear is made of record and the clerk has sent the required ten-days' notice to a defendant and defendant's surety, the 90-day time period should be "tolled" for ten days. If a defendant does not appear within those ten days, the 90-day time period should "start anew." If a defendant appears within those ten days, he should be given an opportunity to be heard before being condemned to suffer "grievous loss" of his speedy trial rule "liberty" interest.

After affording a defendant an opportunity to be heard at a hearing specifically addressing the speedy trial issue, the trial court should make a determination if a defendant had "good cause" for not appearing. If a defendant does not have "good cause," the 90-day time period should "start anew," unless the state is not prejudiced by the delay and the trial court exercises discretion to "toll" the 90-day period. If the cause be attributable to an incident beyond a defendant's control and the state is not prejudiced by the delay, the 90-day time period should be "tolled." But if the cause be attributable to the state, the time should be "taxed" from the 90-days.

Bail and a speedy trial within 90-days after indictment are species of "property" and "liberty," respectively, and are protected by the Fourteenth Amendment Due Process Clause. While each interest is subject to *forfeiture* for a defendant's failure to appear, neither a defendant nor a defendant's surety can be condemned to suffer permanent "grievous loss" without an opportunity to be heard at a meaningful time and in a meaningful manner.

Appellant was denied his constitutionally protected speedy trial rule "liberty" interest by arbitrarily being denied the

written ten-days' notice required by Iowa Code § 811.6 (1) after his non-appearance on May 4, 2004, in violation of the Due Process Clause of the Fourteenth Amendment.

COST CERTIFICATE

I hereby certify that the cost of printing this final reply brief was $11.30.

Michael Young

APPENDIX H

Iowa Code § 811.6 (1)

A defendant released pursuant to this chapter shall appear at arraignment, trial, judgment, or such other proceedings where the defendant's personal appearance is required. If the defendant fails to appear at the time and place when the defendant's personal appearance is lawfully required, or to surrender in execution of the judgment, the court must direct an entry of the failure to be made of record, and the undertaking of the defendant's bail, or money deposited, is thereupon forfeited. As part of the entry, except as provided in rule of criminal procedure 2.72, the court shall direct the clerk of the district court of the county to give ten days' notice in writing to the defendant and the defendant's sureties to appear and show cause, if any, why judgment should not be entered for the amount of bail. If such appearance is not made, judgment shall be entered by the court. If appearance is made, the court shall set the case down for immediate hearing as an ordinary action.

Iowa Code § 811.7 (1)

The magistrate may, by an order entered on the record, direct the defendant to be arrested and committed to jail until legally discharged, after the defendant has given bail or deposited

money in lieu thereof, or otherwise is released pursuant to this chapter, when it satisfactorily appears to the court that the defendant has failed to appear as required, or the defendant has violated a condition of release, or when, after the filing of an indictment or information, the court finds the bail taken or money deposited is insufficient.

Iowa Rules of Criminal Procedure

Rule 2.33 Dismissal of prosecutions; right to speedy trial

(1) *Dismissal generally; effect.* The court, upon its own motion or the application of the prosecuting attorney, in the furtherance of justice, may order the dismissal of any pending criminal prosecution, the reasons therefor being stated in the order and entered of record, and no such prosecution shall be discontinued or abandoned in any other manner. Such a dismissal is a bar to another prosecution for the same offense if it is a simple or serious misdemeanor; but it is not a bar if the offense charged be a felony or an aggravated misdemeanor.

(2) *Speedy trial.* It is the public policy of the state of Iowa that criminal prosecutions be concluded at the earliest possible time consistent with a fair trial to both parties. Applications for

dismissals under this rule may be made by the prosecuting attorney or the defendant or by the court on its own motion.

a. When an adult is arrest for the commission of a public offense, or, in the case of a child, when the juvenile court enters an order waiving jurisdiction pursuant to Iowa Code section 232.45, and an indictment is not found against the defendant within 45 days, the court must order the prosecution to be dismissed, unless good cause to the contrary is shown or the defendant waives the defendant's right thereto.

b. if a defendant indicted for a public offense has not waived the defendant's right to a speedy trial the defendant must be brought to trial within 90 days after indictment is found or the court must order the indictment to be dismissed unless good cause to the contrary be shown.

c. all criminal cases must be brought to trial within one year after the defendant's initial arraignment pursuant to rule 2.8 unless an extension is granted by the court, upon a showing of good cause.

d. if the court directs the prosecution to be dismissed, the defendant, if in custody, must be discharged, or the defendant's

bail, if any, exonerated, and if money has been deposited instead of bail, it must be refunded to the defendant.

(3) *Jury impaneled outside of county.* For puposes of this section, when a jury is to be impaneled from outside the county under rule 2.11(10)d, a defendant is deemed to have been brought to trial as of the day when the trial commences in the county in which jury selection takes place.

(4) *Change of venue after jury selection commenced.* Whenever a change of venue is granted pursuant to Iowa Code section 803.2, the defendant may be brought to trial within 30 days of the grant of the change of venue, notwithstanding rule 2.33(2)b.

Renumbered from § 813.2, Rule 27 and amended Nov. 9, 2001, eff. Feb. 15, 2002.

United States Constitution Sixth Amendment

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory

process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

United States Constitution Fourteenth Amendment Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.